Supreme Court, U. S.
FILED
OCT 11 1977
MICHAEL RODAK, JR., CLERK

No. 76-1855

In the Supreme Court of the United States

OCTOBER TERM, 1977

SPENCER PRESS, INC., APPELLANT

v.

JEROME KURTZ, COMMISSIONER OF INTERNAL REVENUE FOR THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the appellee, the Commissioner of Internal Revenue, moves that the order of the district court be affirmed.

STATEMENT

This is a direct appeal under 28 U.S.C. 1253, from a final order of a three-judge district court dismissing appellant's complaint which sought to enjoin the Commissioner of Internal Revenue from collecting additions to tax assessed under Section 6651(a) of the Internal Revenue Code of 1954 (26 U.S.C.) for appellant's failure to file timely returns (J.S. 2; J.S. App. B, pp. 28-33).

The pertinent facts are as follows: Appellant failed to file income tax returns for 1966 through 1970. Upon notification by the Internal Revenue Service that no returns had been filed for those years, appellant filed the

delinquent returns and paid in full all of the tax and interest due.[1] Appellant requested the waiver of any penalties and additions to tax for the late filing of the returns on the ground that it relied on its accountant to prepare and file the returns. The Internal Revenue Service denied the request and assessed additions to tax of $29,636.98 under Section 6651(a)(1) of the Code for failure to file timely returns for 1969 and 1970, and informed appellant of its intention to collect the additions to tax owed (J.S. 4; J.S. App. B, pp. 23, 29).

Appellant thereupon commenced this action in the United States District Court for the District of Massachusetts to enjoin the Commissioner from collecting the additions to tax for late filing of the 1969 and 1970 tax returns. Appellant contended that the collection of the additions to tax prior to a judicial determination of the propriety of the assessment denied it due process of law in violation of the Fifth Amendment to the Constitution. Appellant further sought either a declaratory judgment that no additions to tax were owed or an order requiring the Commissioner to issue a deficiency notice so that the issue might be presented to the Tax Court prior to collection. The district court denied the relief requested and dismissed the complaint (J.S. 4; J.S. App. B, pp. 21-24).

The court of appeals agreed with the district court that the applicable statutes precluded a pre-levy judicial determination of appellant's liability for the additions to tax and that the complaint stated no ground upon which a single-judge district court could grant relief (J.S. App. B, pp. 22-23, 29). However, the court of appeals remanded the case to the district court "with instructions to call for convening of a three-judge [district] court should the plaintiff [appellant] within ten days file an amended

[1]There was no tax due for the years 1966 through 1968.

complaint requesting such a court and raising appropriately framed [constitutional] issues" (J.S. App. B, p. 27).

Appellant filed an amended complaint seeking the convening of a three-judge district court to determine the constitutionality of the issue raised in its original complaint and to enjoin the collection of the assessed additions to tax.[2] The Commissioner moved to dismiss the complaint on the ground that the suit was barred by 26 U.S.C. 7421(a), which prohibits any court from entertaining any suit for the purpose of restraining the assessment or collection of any taxes. The three-judge district court agreed with the Commissioner that the action was barred by 26 U.S.C. 7421(a). In the district court's view, this Court's decision in *Bob Jones University* v. *Simon*, 416 U.S. 725, reaffirmed that the statutory bar against injunctive actions in tax cases was not a denial of due process as long as the taxpayer could seek judicial review in a refund action, as appellant could in this case (J.S. App. B, pp. 29-31). The three-judge district court accordingly dismissed the complaint (J.S. App. B, p. 32).

ARGUMENT

The decision below is correct and there is no substantial question warranting plenary review by this Court.

1. Under the Internal Revenue Code of 1954, the only means by which a taxpayer can seek a judicial determination of the correctness of an assessment for an addition

[2]Section 2 of the Act of August 12, 1976, Pub. L. 94-381, 90 Stat. 1119, repealed 28 U.S.C. 2282, which provided for a three-judge district court in a case where the plaintiff sought "[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States * * *." However, the repeal is inapplicable to actions commended on or before August 12, 1976.

to tax under Section 6651(a) for failure to file timely a return, is to pay the amount assessed and sue for a refund in the district court or the Court of Claims. See Sections 6201(a), 6211(a), 6212(a), 6213(a), 6659(a) and (b), 7421 (a) and 7422(a), Appendix, *infra*. Indeed, to overrule certain court decisions and reinstate what was believed to have been the law since 1926, Congress amended Section 6659(b), by the Act of May 14, 1960, 74 Stat. 132, to provide that additions to tax because of the late filing of the return shall be assessed without the issuance of a statutory notice of deficiency where there is no deficiency in tax as described in Section 6211.[3] See H.R. Rep. No. 1217, 86th Cong., 2d Sess. 1-4 (1960); S. Rep. No. 1098, 86th Cong., 2d Sess. 3-4 (1960); H.R. Cong. Rep. No. 1549, 86th Cong., 2d Sess. 2 (1960).[4]

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[3]Here, there is no deficiency in tax as described in Section 6211. Accordingly, appellant cannot seek review in the Tax Court, the jurisdiction of which is limited to cases involving deficiences. See Section 6213.

[4]The report of the Committee on Ways and Means explained (H.R. Rep. No. 1217, *supra*, at 1-3):

> H.R. 9660 deals with the procedure for assessing certain additions to tax. Since 1926, additions to the tax shown on the return by reason of late filing of income tax returns have been assessed without the issuance of a statutory notice of deficiency (which notice, commonly known as a 90-day letter, gives the taxpayer 90 days in which to petition the Tax Court for a redetermination of a deficiency).
>
> This procedure was approved by the courts under the 1939 code. While the committee reports accompanying the 1954 code state that no change with respect to this procedure was intended, two courts of appeals have recently held that under present law a 90-day letter must be issued before assessment of an addition to tax for late filing.
>
> * * * * * *
>
> Your committee believes immediate enactment of clarifying legislation is vitally important to the orderly administration of

> the internal revenue laws in view of the court decisions. Otherwise, if the Service were forced into the position of having to issue 90-day letters in these cases, it would materially impede the collection of these additions to tax. Moreover, the procedure of assessing these additions without 90-day letters is one which generally has been accepted as an integral part of our tax system.
>
> * * * * *
>
> These court decisions [requiring the issuance of a 90-day letter before assessment of an addition to tax for late filing] have confronted the Internal Revenue Service with very serious administrative problems. For example, before a 90-day letter could be mailed with respect to the addition to tax for late filing, the Internal Revenue Service would have to examine the return to insure that there was no deficiency in tax which might be barred from later assessment because of the restrictions on the issuance of additional 90-day letters under section 6212(c) of the 1954 code. Such a procedure would force the Service to audit many thousands of returns which otherwise might not be audited. If the Service were forced to follow the 90-day letter procedure for additions to tax for late filing of returns and for underpayment of estimated tax, the number of 90-day letters issued each year would be increased to about 1 million; whereas the Service now issues only about 78,000 90-day letters each year for all causes.
>
> As a consequence, the Internal Revenue Service would either be forced to abandon most of its enforcement efforts in the area of late returns and underpayments of estimated tax or materially curtail the already limited number of returns audited in the course of a year. On the other hand, in practically all these cases there is no dispute either as to law or fact. Moreover, the Internal Revenue Service has for years apparently administered these provisions of the law in a practical, commonsense manner. Under such circumstances little purpose is served by invoking the elaborate 90-day letter procedure before assessing these additions to tax.
>
> Accordingly, your committee has provided in general, that, after the date of the enactment of the bill, the additions to tax for the late filing of income, estate, and gift tax returns and the underpayment of estimated income tax are to be assessed and collected without the issuance of a 90-day letter. This would restore the procedure followed by the Internal Revenue Service for many years.

Upon the Commissioner's assessment of the additions to tax against appellant, a statutory lien arose against appellant's property for the amounts assessed. Sections 6321 and 6322, Internal Revenue Code of 1954, Appendix, *infra*, pp. 4a-5a. In addition, the Internal Revenue Service has the power to levy upon a taxpayer's property to satisfy an unpaid assessment where the taxpayer refuses to pay the assessment within 10 days after notice and demand. Section 6331(a), Appendix, *infra*, pp. 5a-6a.[5]

Section 7421(a) of the Code (commonly known as the Anti-Injunction Act) bars suits to restrain or enjoin the assessment or collection of any tax. Pursuant to Section 6659(a)(2), statutory references to "tax" include additions to tax imposed for late filing under Section 6651(a). In *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 6-7; *Bob Jones University* v. *Simon*, 416 U.S. 725, 737; *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 758, this Court held the bar of Section 7421 to be absolute except upon a showing (1) that under no possible circumstances could the government prevail and (2) that the plaintiff would suffer irreparable injury for which there was no legal remedy. Appellant does not urge that its case falls within this narrow exception. Thus, the only issue presented on this appeal is whether the statutory requirement that a taxpayer can seek judicial review of the imposition of an addition to tax for late filing only after payment is consistent with due process under the Fifth Amendment.

Since *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 275-282, this Court has consistently held that summary seizure of property for collection of taxes does not violate the constitutional requirement

[5]Pending the disposition of this litigation, the Internal Revenue Service has voluntarily delayed the collection of the additions to tax at issue.

of due process as long as the taxpayer has an adequate opportunity for ultimate judicial determination of the liability. See, *e.g.*, *Springer* v. *United States*, 102 U.S. 586, 593-594; *Dodge* v. *Osborn*, 240 U.S. 118; 121-122; *Phillips* v. *Commissioner*, 283 U.S. 589, 595-597; *Fuentes* v. *Shevin*, 407 U.S. 67, 91-92; *Commissioner* v. *Shapiro*, 424 U.S. 614, 630 n. 12. But see *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 611; *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601. This Court has likewise upheld the summary collection of additions to taxes, civil penalties and interest that are imposed as civil sanctions for prompt payment of taxes. *Helvering* v. *Mitchell*, 303 U.S. 391, 402; *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 338-339. Accord: *Professional Engineers, Inc.* v. *United States*, 527 F. 2d 597 (C.A. 4); *Harvey* v. *Early*, 160 F. 2d 836, 837 (C.A. 4); *Reams* v. *Vrooman-Fehn Printing Co.*, 140 F. 2d 237, 240-241 (C.A. 6); *McDowell* v. *Heiner*, 9 F. 2d 120, 122-123 (W.D. Pa.), affirmed *per curiam*, 15 F. 2d 1015 (C.A. 3), certiorari denied, 273 U.S. 759.

Indeed, the Court has described the refund suit procedure available to appellant as representing a complete system of corrective justice enacted pursuant to the government is right to prescribe the condition on which it would subject itself to the judgment of the courts in the collection of its revenues. *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, *supra*, 18 How. at 276; *Nichols* v. *United States*, 7 Wall. 122, 126-127, 130-131; *Cheatham* v. *United States*, 92 U.S. 85, 88-89; *State Railroad Tax Cases*, 92 U.S. 575, 613-614; *Snyder* v. *Marks*, 109 U.S. 189, 193-194; *Oceanic Navigation Co.* v. *Stranahan*, *supra*, 214 U.S. at 339; *Phillips* v. *Commissioner*, *supra*, 283 U.S. at 595-597; *Enochs* v. *Williams*

Packing Co., supra, 370 U.S. at 7; *Bob Jones University* v. *Simon, supra,* 416 U.S. at 746-747; *Alexander* v. *"Americans United" Inc., supra,* 416 U.S. at 761-762; *United States* v. *American Friends Service Com.,* 419 U.S. 7, 12. "Delay in the judicial determination of property rights is not uncommon where it is essential that government needs be immediately satisfied." *Phillips* v. *Commissioner, supra,* 283 U.S. at 597. Appellant's constitutional challenge to the statutory requirement that it first pay the addition to tax and then sue for a refund is insubstantial.[6]

CONCLUSION

The order of the district court should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

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[6]*Lipke* v. *Lederer,* 259 U.S. 557, and the dictum in *Burke* v. *Mingori,* 128 F. 2d 996 (C.A. 10), upon which appellant relies (Br. 8), are inapposite. They are addressed to criminal penalties and not civil sanctions of the type involved here. Indeed, in *Helvering* v. *Mitchell, supra,* 303 U.S. at 402, the Court recognized that *Lipke* v. *Lederer* was not applicable where Congress had provided a civil sanction for the collection of taxes. See also *Bob Jones University* v. *Simon, supra,* 416 U.S. at 743. Moreover, in *Burke* v. *Mingori, supra,* 128 F. 2d at 997, the court stated that "the additions for failure to make return and for failure to pay the tax are civil incidents of the assessment and collection, not penalties in the nature of punishment. *Helvering* v. *Mitchell,* 303 U.S. 391, * * *."

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6201. ASSESSMENT AUTHORITY.

(a) *Authority of Secretary or Delegate.*—The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) *Taxes shown on return.*—The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title.

(2) *Unpaid taxes payable by stamp.*—

(A) *Omitted stamps.*—Whenever any article upon which a tax is required to be paid by means of a stamp is sold or removed for sale or use by the manufacturer thereof or whenever any transaction or act upon which a tax is required to be paid by means of a stamp occurs without the use of the proper stamp, it shall be the duty of the Secretary or his delegate, upon such information as he can obtain, to estimate the amount of tax which has been omitted to be paid and to make assessment therefor upon the person or persons the Secretary or his delegate determines to be liable for such tax.

(B) *Check or money order not duly paid.*—In any case in which a check or money order received under authority of section 6311 as payment for stamps is not duly paid, the unpaid amount may be immediately assessed as if it were a tax imposed by this title, due at the time of such receipt, from the person who tendered such check or money order.

(3) *Erroneous income tax prepayment credits.*—If on any return or claim for refund of income taxes under subtitle A there is an overstatement of the credit for income tax withheld at the source, or of the amount paid as estimated income tax, the amount so overstated which is allowed against the tax shown on the return or which is allowed as a credit or refund may be assessed by the Secretary or his delegate in the same manner as in the case of a mathematical error appearing upon the return.

(4) [as added by Sec. 809(d)(4)(A), Excise Tax Reduction Act of 1965, 79 Stat. 168 and amended by Sec. 207(d)(1), (2), Act of May 21, 1970, 84 Stat. 248] *Erroneous credit under section 39.*—If on any return or claim for refund of income taxes under subtitle A there is an overstatement of the credit allowable by section 39 (relating to certain uses of gasoline, special fuels, and lubricating oil), the amount so overstated which is allowed against the tax shown on the return or which is allowed as a credit or refund may be assessed by the Secretary or his delegate in the same manner as in the case of a mathematical error appearing upon the return.

* * * * *

SEC. 6211. DEFINITION OF A DEFICIENCY.

(a) [as amended by Sec. 101(f)(1), Tax Reform Act of 1969, 83 Stat. 524] *In General*—For purposes of this title in the case of income, estate, gift, and excise taxes, imposed by subtitles A and B, and chapter 42, the term "deficiency" means the amount by which the tax imposed by subtitle A or B or chapter 42 exceeds the excess of—

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b) (2), made.

* * * * *

SEC. 6212. NOTICE OF DEFICIENCY.

(a) [as amended by Sec. 89(b), Technical Amendments Act of 1958, 72 Stat. 1665 and Sec. 101(j)(40), Tax Reform Act of 1969, *supra*] *In General.*—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 42, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

* * * * *

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) [as amended by Sec. 101(j)(42), Tax Reform Act of 1969, *supra*] *Time for Filing Petition and Restriction on Assessment.*—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien

in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 6322 [as amended by Sec. 113(a), Federal Tax Lien Act of 1966, 80 Stat. 1146] PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the

Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

* * * * *

SEC. 6651. FAILURE TO FILE TAX RETURN OR TO PAY TAX.

(a) [as amended by Sec. 943(a), Tax Reform Act of 1969, *supra*] *Addition to the Tax.*—In case of failure—

(1) to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate;

(2) to pay the amount shown as tax on any return specified in paragraph (1) on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), unless it is shown that such failure

is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax on such return 0.5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate; or

(3) to pay any amount in respect of any tax required to be shown on a return specified in paragraph (1) which is not so shown (including an assessment made pursuant to section 6213(b)) within 10 days of the date of the notice and demand therefor, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount of tax stated in such notice and demand 0.5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

* * * * *

SEC. 6659. APPLICABLE RULES.

(a) *Additions Treated as Tax.*—Except as otherwise provided in this title—

(1) The additions to the tax, additional amounts, and penalties provided by this chapter shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes;

(2) Any reference in this title to "tax" imposed by this title shall be deemed also to refer to the

additions to the tax, additional amounts, and penalties provided by this chapter.

(b) [as amended by Sec. 1, Act of May 14, 1960, 74 Stat. 132 and Sec. 101(j)(51), Tax Reform Act of 1969, *supra*] *Procedure for Assessing Certain Additions to Tax.*—For purposes of subchapter B of chapter 63 (relating to deficiency procedures for income, estate, gift, and chapter 42 taxes), subsection (a) shall not apply to any addition to tax under section 6651, 6654, or 6655; except that it shall apply—

(1) in the case of an addition described in section 6651, to that portion of such addition which is attributable to a deficiency in tax describe in section 6211; or

(2) to an addition described in section 6654 or 6655, if no return is filed for the taxable year.

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, *supra*] *Tax.*—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * * *

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged

to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * * *